No. 10,065

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

JOHN KONG YEUNG,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

TERRITORY'S ANSWERING BRIEF

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By.....
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STATEMENT OF QUESTIONS INVOLVED

A slight amplification of Appellant's statement of the case is offered to assist in designating the questions involved on this appeal.

John Kong Yeung, the Appellant, was charged with murder in the second degree in violation of Section 5990, Revised Laws of Hawaii 1935, in an indictment returned on October 2, 1941 by a grand jury impaneled for the First Judicial Circuit of the Territory of Hawaii. The Circuit Court for that Circuit assumed jurisdiction over the defendant and of the cause covered by the indictment (Rec. pp. 2-5). After arraignment but prior to entry of plea, the defendant filed a petition in the United States

District Court for the Territory of Hawaii praying for a removal of the cause against him to that court (Rec. pp. 3, 5 and 8). A Writ of Habeas Corpus Cum Causa was issued in response to the petition and the cause was ordered removed to the Federal District Court (Rec. p. 16). The Territory interposed a motion for a remand of the cause to the court of origin on the general grounds that the averments of the petition were too indefinite and insufficient to support a removal or a determination of whether the cause was one that might be removed (Rec. p. 21). Thereupon the defendant obtained leave to file and did file an amended petition which in substance alleged that when the defendant shot and killed the deceased on the occasion set forth in the indictment, he was on duty and acting as a United States customs guard. The amended petition further set forth with considerable particularity a version of the circumstances attending the killing and the defendant's contention that it was committed as an accident, in self defense, to consummate an arrest of the deceased and to prevent the commission of a felony by the latter, all of which were averred to have been necessary incidents to the performance of the defendant's duty as such customs guard (Rec. pp. 38-40). The petition was framed to meet the requirements of 28 U.S.C.A. Section 76. No further opposition was made to the removal after the amended petition was filed (Rec. p. 55). Issue was joined (Rec. p. 56) and the trial proceeded in the regular course to a verdict against and sentence of the defendant for manslaughter (Rec. pp. 48-50). Appellant seeks by this appeal to have that conviction set aside on the purported basis that the District

Court was without legal authority to accept jurisdiction of the cause presented by the Territorial indictment.

The jurisdiction of the Territorial Circuit Court is conceded by Appellant (Op. Br. pp. 1-2). The opening brief makes no suggestion that the capacity in which the amended petition alleges the defendant was acting at the time of the offense was not one within the purview of 28 U.S.C.A. 76, nor is any point raised that the allegations of the amended petition were in any other manner insufficient to meet the requirements of that statute so as not to have authorized the lower court to assume jurisdiction over the cause if the provisions of the cited statute were made applicable by Paragraph (d) of Section 86 of the Hawaiian Organic Act (48 U.S.C.A. 645). Hence Appellant's attack on the lower court's jurisdiction, read in light of the contentions urged in the opening brief against the background of the record, resolves this appeal to a consideration of the following:

First: Does Section 86 of the Hawaiian Organic Act make the laws of the United States regulating the removal of causes applicable between the Territorial trial courts and the United States District Court for the Territory of Hawaii? If so,

Second: Are the provisions of said Section 86 so extending the laws of the United States on the removal of causes to the Territory of Hawaii still in effect or have they been repealed by implication?

ARGUMENT

POINT 1.

SECTION 86 OF THE HAWAIIAN ORGANIC ACT MAKES THE LAWS OF THE UNITED STATES RELATING TO REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL DISTRICT COURTS APPLICABLE BETWEEN THE TERRITORIAL TRIAL COURTS AND THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII.

Section 86 of the Hawaiian Organic Act was originally enacted as a single paragraph (Chapter 339, 31 Stat. at L. 158). It read, with the conformity clause pertinent to the issue at hand italicized, as follows:

> "Section 86. That there shall be established in said Territory a district court to consist of one judge, who shall reside therein and be called the district judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney, and a marshal of the United States for the said district, and said judge, attorney, and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as writs of error and appeals are allowed from district courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court.

> *The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii.* Regular terms of said court shall be held at Honolulu on the second Monday in April and October and at Hilo on the last Wednesday in January of each year; and special terms may be held at such times and places in said district as the said judge may deem expedient. The said district judge shall appoint a clerk for said court at a salary of three thousand dollars per annum, and shall appoint a reporter of said court at a salary of twelve hundred dollars per annum."

In presenting his case on the construction of the conformity clause, above emphasized, Appellant in substance contends that the Federal court created by Section 86 of the Organic Act is not a "court of the United States" and that the phrase "removal of causes" as therein used has reference only to appellate transfers so that the statute does not provide for the removal of causes from any Territorial trial court to the United States District Court for the Territory of Hawaii.

The construction offered by Appellant is completely vulnerable to precedent and reason.

(1)

SECTION 86 OF THE ORGANIC ACT HAS BEEN JUDICIALLY CONSTRUED TO AUTHORIZE THE REMOVAL OF CAUSES FROM THE TERRITORIAL TRIAL COURTS TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII.

Within less than six months after the effective date of the Hawaiian Organic Act the Supreme Court of the Territory had occasion in *Hind v. Wilder's Steamship Co.,* 13 Haw. 174, to consider and construe the above

referred to conformity clause of Section 86 of the Organic Act. After the Supreme Court had affirmed a decree in admiralty rendered prior to annexation in a circuit court of the Republic of Hawaii against the Steamship Company, the company moved to have bond fixed for an appeal to the Ninth Circuit Court of Appeals. It contended that Section 15 of the so-called Evarts Act (26 Stat. at L. 830, Chap. 517), controlled. That statute vested jurisdiction to review the decisions of the supreme courts of the Territories in the circuit courts of appeals. The Supreme Court held, however, that the general statute on appeals from territorial courts was inoperative in the case because the appellate procedure was specifically regulated by the provisions of Section 86, supra, which placed the courts of the Territory of Hawaii in the same relative position to the Federal judicial system as the state courts, and since no appeal could be taken from any state court to a circuit court of appeals, the Hawaiian Supreme Court declined to recognize or participate in perfecting the Steamship Company's attempted appeal. The company then made direct application to this Court which said, inter alia, in a comprehensive opinion denying the appeal, that:

> "Congress found in the republic of Hawaii a system of courts already established, whose jurisdiction was complete, and from the highest tribunal of which there was no appeal. To that system congress, by the act, added a district court, conferring upon it the jurisdiction which pertains to the district and circuit courts of the United States, and providing for removing to that court from the territorial courts causes which under the removal acts were removable from a state court to a court of the United States . . ."

Wilder's S.S. Co. v. Hind, 108 F. 113 at 116.

The holding and basic reasoning of this Court and the Territorial Supreme Court were approved by the United States Supreme Court when it refused to grant a writ of mandamus to compel entertainment of the appeal (*In re Wilder Steamship Co.,* 183 U.S. 545, 46 L. Ed. 321).

The United States District Court for the Territory of Hawaii has likewise held that causes might be brought to it from the Territorial trial courts just as removals are allowed from State courts to Federal district courts in the continental United States.

> "The laws relating to removal of causes were extended to the district of Hawaii by our Organic Act, Sec. 86 . . ."
>
> *Farm Corn v. Wardell,* 4 U.S.D.C. Haw. 605.

It is thus seen that this Court, supported by highly respectable authority, has ruled adversely to Appellant's contention that the Organic Act does not provide for the removal of causes to the United States District Court for the Territory of Hawaii.

(2)

IN CREATING THE GOVERNMENT FOR THE TERRITORY OF HAWAII CONGRESS ESTABLISHED SEPARATE TERRITORIAL AND FEDERAL JUDICIAL SYSTEMS HAVING A RELATIONSHIP TO EACH OTHER CORRESPONDING TO THAT EXISTING BETWEEN THE STATE AND FEDERAL SYSTEMS.

The exact point in the Wilder's Steamship Company case pertained to the phrase in the conformity clause concerning writs of error and appeals and it is therefore true, as undoubtedly we shall be reminded in Appellant's reply brief, that the ruling of this Court deciding the issue at hand against his contention was dictum. However that may be, and aside from the question of what weight

should be accorded judicial dictum where the point incidently ruled upon is so closely connected to the issue decided as it is in the Wilder's case, Appellee's counter proposal that Section 86 of the Organic Act provides for removals is but a corollary to the principal holding of the case.

The problem involves no question of legislative authority. It is merely one of statutory construction. Consequently, the inquiry is confined to ascertaining what Congress intended by the language it used in the clause under consideration.

> "The question here, as in any problem of statutory construction, is the intention of the enacting body."
>
> *U.S. v. Rosenblum Truck Lines,* — U.S. — 62 S. Ct. 445, 86 L. Ed. 387 at 389.
>
> *Lincoln v. Ricketts,* 297 U.S. 373, 80 L. Ed. 724 at 727
>
> *Haw. v. Mankichi,* 190 U.S. 197, 47 L. Ed. 1016 at 1021.

If the wording of the conformity clause be deemed ambiguous or if it is capable of being made so by the method of construction adopted in the opening brief, then we are at liberty to look to the general purpose and the historical background of the enactment containing the clause for assistance in determining its proper meaning.

> "All statutes must be construed in the light of their purpose."
>
> *Haggar Co. v. Helvering,* 308 U.S. 389, 84 L. Ed. 340 at 344.

> "If the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress."
>
> *Porto Rico Railway L. & P. Co. v. Mor,* 253 U.S. 345, 64 L. Ed. 944 at 946.

> "The act was the product of a period, and 'courts, in construing a statute may with propriety recur to the history of the time when it was passed.' "
>
> *Great Northern R. Co. v. U.S.*, — U.S. — 62 S. Ct. 529, 86 L. Ed. 446 at 448
>
> *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 78 L. Ed. 1361 at 1366.

Much of the information required for the application of the foregoing rules of construction is within easy reach.

The portion of this Court's opinion in the Wilder's Steamship Company case quoted above (ante, p. 6) contemporaneously recorded that Congress found a mature judiciary prevailing in Hawaii when it undertook establishing a Territorial government for the Islands. That system was the product of considerably more than a half century's development under organized constitutional government and it was comparable to the judicial systems then existing in the various states. (See *Carter v. Second Judge, First Circuit,* 16 Haw. 242 at 247 et seq.). In that respect the situation was entirely unlike that which had confronted Congress when it had assumed the task of providing organized governments for the various territories incorporated into the Union theretofore, so that instead of providing for the establishment of one court having jurisdiction over both local and federal matters as had been the usual rule in legislating for new territories, in the case of our Territory Congress kept the two jurisdictions completely separate. It perpetuated the existing courts and invested them with jurisdiction over local laws and cases and in addition created a United States District Court to take jurisdiction of Federal laws and cases, and it placed the latter court in the same relationship to the

Territorial courts as the Federal district and circuit courts were to state courts.

> "It organized the courts and distributed their jurisdiction in this territory as it has done in no other territory—namely, on the lines of federal and state courts in the several States. . . . it created both classes of courts—one with the jurisdiction of District and Circuit Courts of the United States, the other corresponding to the courts of a State, and, having done so, it naturally placed the two classes of courts on the same footing as to appeals and other proceedings as the corresponding federal and State courts elsewhere, that is, in the several States."
>
> *Hind v. Wilder's Steamship Co., supra,* 13 Haw. 174 at 182.
>
> "Upon consideration of the various provisions of the act providing a government for the territory of Hawaii, we are convinced that congress intended thereby to establish in that territory between the federal court created by the act and the system of territorial courts then existing, and substantially by the act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states."
>
> *Wilder's S.S. Co. v. Hind, supra,* 108 Fed. 113 at 114-115.
>
> Also:
>
> *U.S. v. Bower,* 4 U.S.D.C. Haw. 466
>
> *In the Matter of Atcherley,* 3 U.S.D.C. Haw. 404 at 430
>
> *U.S. v. Moore, et al,* 3 U.S.D.C. Haw. 66
>
> *Terr. v. Kaizo,* 17 Haw. 295 at 297
>
> *In re Abreu,* 27 Haw. 237 at 240
>
> 9 *Ann. Cas.* 394 at 395.

Since the general purpose of Congress was to place the Territorial courts in the same relationship to the Federal

judicial system in which the state courts stood, it logically follows that Congress intended that each and every incident of that relationship, including the removal of causes, should also pertain between the Territorial and Federal judicial systems. "Legislation aimed at a whole embraces all its part," *U.S. v. Darby,* 312 U.S. 122, 85 L. Ed. 609 at 622. The broad language of the statute, *"the laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states,"* could hardly have been made more inclusive to extend every feature involved in the relationship between State and Federal courts on the mainland to the Territorial and Federal courts in Hawaii.

The Appellant urges, however, that there can be no local application of the statute's provisions on the removal of causes because the United States District Court for the Territory is not one of the "courts of the United States" (Op. Br. p. 20). We believe sufficient answer to the proposition may readily be inferred from what has already been covered herein. Further analysis of and reply to the details of Appellant's argument will, however, afford a satisfactory means of checking the soundness and strength of Appellee's position.

(3)

THE DISTRICT COURT ESTABLISHED BY SECTION 86 OF THE HAWAIIAN ORGANIC ACT IS A "COURT OF THE UNITED STATES" WITHIN THE MEANING AND APPLICATION OF THAT SECTION.

On page 20 of the opening brief Appellant asserts that his contention that the United States District Court for the Territory of Hawaii is not one of the "courts of the

United States" was "squarely raised and settled" in *U.S. v. Mookini,* 303 U.S. 201, 82 L. Ed. 748.

The direct holding in the Mookini case was that the Rules promulgated by the Supreme Court in 1934 for criminal cases originating "in District Courts of the United States and in the Supreme Court of the District of Columbia" were not applicable to the United States District Court for the Territory of Hawaii. The Rules had been drafted by the Attorney General of the United States and submitted to the Court with a recommendation that they be confined to the continental United States because of a lack of data on the special conditions which might require different treatment for the non-continental courts and in reaching the conclusion it did, the Court based its decision primarily on the fact that in considering and revising the draft it had approved and intended to follow the Attorney General's recommendation. The Court then added:

> "The term 'District Courts of the United States,' as used in the rules without an addition expressing a wider connotation, has its historic significance. It describes the constitutional courts created under article 3 of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States.' " (p. 751).

It is seen from the foregoing review that the Supreme Court did not hold that the United States District Court for the Territory of Hawaii is not a "court of the United States" and it further appears that even the term "District

Courts of the United States" might have a less restricted meaning than the Court thought appropriate to its use in the particular circumstances of the case before it. We cannot concede the applicability herein of the Mookini case. But even if the Supreme Court had held, as claimed, that the United States District Court for the Territory of Hawaii was not a court of the United States, Appellant's technique in endeavoring to utilize the holding by extracting the term "courts of the United States" from its setting in Section 86 of the Organic Act, affixing the meaning purportedly given it in its use in such other connection, and then trying to force a construction of the statute to accommodate that meaning, runs contrary to approved methods.

> " . . . To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute . . ."
>
> *U.S. v. American Truck Assns.,* 310 U.S. 534, 84 L. Ed. 1345 at 1350

> " . . . The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. Compare Rein v. Lane, L. R. 2 Q.B. 144, 151. The intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection."
>
> *Helvering v. Stockholms Enskilda Bank,* 293 U.S. 84, 79 L. Ed. 211 at 218.

The authorities referred to in the Mookini case recognize, as do many others that could be cited, that there are two general types or classes of courts which Congress might have occasion to deal with. One, the constitutional, includes those courts which are created under and derive their judicial authority from Article III of the Constitution defining the judicial power of the United States. The other, the legislative, includes those which are created by and derive their judicial authority from Congress acting under an enabling provision of the Constitution such as Section 3 of Article IV giving it power to make rules and regulations for the Territories. But whether a court falls into one or the other category can be of real significance only when the litigated issue calls for a determination of whether or not an enactment affecting a court is consistent with the powers conferred or the limitations imposed upon Congress by the Constitution.

There are cases, typified by *O'Donoghue v. U.S.,* 289 U.S. 516, 77 L. Ed. 1356, cited in the opening brief (p. 20), where a determination of the classification of the particular court under consideration decides the issue, but where, as here, the question involves only the interpretation of language used in describing a court, the actual nature or classification of the court should be of little importance. As has been mentioned before we are not concerned with a measurement of legislative authority but are involved only in determining the legislative intent so there is no necessity for a hyper-critical scrutiny of the labels Congress has used to tab the various courts mentioned in Section 86 when the purpose intended to be effectuated by the legislation is otherwise made patent.

"In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure."

Atlantic Coast Line Railroad Co. v. Burnette, 239 U.S. 199, 60 L. Ed. 226 at 227.

"It must be admitted that the words 'United States district court' were not accurately used, as the United States court in the Indian territory was not a district or circuit court of the United States (Re Mills, 135 U.S. 263, 268 [34: 107, 110]), and no such court had, at the date of the act, jurisdiction therein. But as, manifestly, the appeal was to be taken to a United States court having jurisdiction in the Indian territory, and in view of the other terms of the act bearing on the immediate subject-matter, to say nothing of subsequent legislation, it is clear that the United States court in the Indian territory was the court referred to . . ."

Stephens v. Cherokee Nation, 174 U.S. 445, 43 L. Ed. 1041 at 1052.

See also:

The Coquitlam v. U.S., 163 U.S. 546, 41 L. Ed. 184 at 186.

The District Court of the Territory of Hawaii is a legislative court, but that fact does not prevent it from being considered a court of the United States (*Ex parte Bakelite Corporation,* 279 U.S. 438, 73 L. Ed. 789 at 798; *Hunt v. Palao,* 4 How. 589, 11 L. Ed. 1115; *Ex Parte Norvell,* 20 Wash. D.C. 348). The substantive provisions of Section 86 indicate that Congress must have considered it a court of the United States for it is only when it is so considered that the words "removal of causes" can play any effective part in the conformity clause under consideration.

The Organic Act itself labels the District Court it created as a court of the United States.

The act was divided into six chapters with appropriate chapter and section titles and headings. Chapter IV of the act was entitled "The Judiciary" and the first section of the chapter, Section 81, established the Territorial courts in Hawaii by the following language:

> "That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish."

The classification and enumeration of Territorial courts was complete and it will be noted that the United States District Court for the Territory of Hawaii was not included in that classification (*U.S. v. Bowers, supra*).

Chapter 5 of the act was entitled "United States Officers." Section 86, included in Chapter 5, created the District Court for the Territory and was entitled "Federal Court." Turning to the title, as we may, (*Robinson v. U.S.,* 42 Ct. Cl. Fed. 52; *Maguire v. Commissioner of Internal Revenue,* 313 U.S. 1, 85 L. Ed. 1149 at 1154) it is clear then that the act itself designates the court as a "Federal Court" or in other words, a United States Court.

The legislature's contemplation of the District Court as a court of the United States is further evidenced by that portion of Section 86 providing for the appointment of a "district judge . . . of the United States," for it is obvious that if the judge presiding over a court is called a "judge of the United States," the court over which he presides must be a "court of the United States."

From the foregoing Appellee submits that whatever

type of court the United States District Court for the Territory of Hawaii may be considered to be in respect to other legislation, that so far as the Hawaiian Organic Act and Section 86 thereof are concerned, it is a court of the United States.

(4)

THE PHRASE "REMOVAL OF CAUSES" IN SECTION 86 OF THE ORGANIC ACT REFERS TO TRANSFERS FROM THE TERRITORIAL TRIAL COURTS TO THE FEDERAL DISTRICT COURT AND NOT TO APPELLATE TRANSFERS.

Appellant states and assumes as a basis for urging that the phrase "removal of causes" refers only to appellate transfers, that the statute was originally entitled "Writs of Error and Appeal" (Op. Br. pp. 21 and 24). The error in the premise has already been disclosed. We have observed that Section 86 of the Organic Act was originally enacted as a single paragraph under the heading "Federal Court" (ante, pp. 4 and 16).

In subsequent amendments Section 86 was broken down into four separate paragraphs. The first two sentences of the one containing the conformity clause were eventually written as Section 645, Title 48 U.S.C.A. The section heading relied upon by Appellant was inserted in that codification and consequently is of no significance in construing the act (*Olson v. City of Sioux Falls,* 63 S.D. 563, 262 N.W. 85 at 87; *Campbell v. City of Helena,* 92 Mont. 366, 16 P. (2d) 1 at 4).

The import and limitation of the term "removal of causes" confining it to transfers between trial courts is too well understood to permit its being twisted to mean or include transfers by appeal. It may signify a change of venue, as is pointed out in the opening brief (p. 24), but there too the transfer is lateral, that is, from one trial court

to another trial court. Even in its general sense the term is never used in legal parlance to denote vertical transfers and in its specific sense, it definitely means transfers from state trial courts to Federal District Courts (*Black's Law Dictionary*). Further, the wording of the statute, *"the laws of the United States* relating to removal of causes," indicates that what was intended to be referred to were the particular laws included in what now appears as Chapter 3 of Title 28 U.S.C.A. under the heading "District Courts; Removal of Causes," all of which pertain to transfers from state trial courts to district courts of the United States.

The term, "removal of causes," is an integral part of Section 86 and as such should be given effect.

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, section 2, it was said that 'A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized, is, that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."
>
> *Washington Market Co. v. Hoffman,* 101 U.S. 112, 25 L. Ed. 782 at 783
>
> *U.S. v. Standard Brewery,* 251 U.S. 210, 64 L. Ed. 229 at 234-235
>
> *Louisville & N. R. Co. v. Mottley,* 219 U.S. 467, 55 L. Ed. 297 at 300-301
>
> *U.S. v. United Verde Copper Co.,* 196 U.S. 207, 49 L. Ed. 449 at 452.

When Appellant's proposal that the phrase under consideration refers to appellate transfers is rejected, as we submit it must be, then the phrase on removals can be given effect only by a construction which will permit the transfer of causes from the Territorial trial courts to the Federal District Court for the Territory. To hold otherwise will necessitate treating the legislature's very specific language on removals as surplusage in direct violation of the principle laid down in the authorities just referred to.

The fallacy of Appellant's contention to the contrary may be further exposed by an analysis of the argument offered on pages 21 and 22 of the opening brief where it is urged that the phrase "courts of the United States," used twice in the second sentence of the statute, (48 U.S. C.A. Sec. 645), "has the same meaning in both places as including the mainland federal courts, the United States Circuit Courts of Appeals and the Supreme Court of the United States," and that consequently "the phrase 'as between the courts of the United States and the courts of the Territory of Hawaii' can mean nothing more than the relations between the Circuit Court of Appeals and the United States Supreme Court on the one hand and the Supreme Court of the Territory of Hawaii on the other."

Appellee fully agrees that the words "courts of the United States" must have a similar meaning in each instance it is used in the statute. But Appellant's argument that the phrase includes the "Circuit Courts of Appeals" disregards entirely the fact that at the time the Organic Act was adopted no appeal could be taken from a state court to a Circuit Court of Appeals (*Hind v. Wilder's Steamship Co., supra,* 13 Haw. 174 at 180). The

Circuit Courts of Appeals were out of the picture completely so that the plural form of "courts of the United States" when first used in the statute could only signify the United States Supreme Court and the Federal District Courts in the various states. A corresponding application therefore requires an interpretation that when used the second time, the phrase, "courts of the United States," means the United States Supreme Court and the United States District Court for the Territory of Hawaii.

The use of the plural in the phrase "the courts of the Territory of Hawaii" is of equal significance for if Appellant's proposal that the conformity clause pertained wholly to appellate transfers were correct, then obviously the singular would have been used since the Hawaiian Supreme Court would have been the only court in the Territory affected. (Appeals from the Federal District Court were and are specifically and separately regulated by the preceding sentence of Section 86, that is, the first sentence of 48 U.S.C.A. 645.) As we are justified in assuming that the plural was used advisedly in the above connection, it necessarily follows that the phrase "courts of the Territory of Hawaii" also includes the circuit and other trial courts of the Territory which courts could only be brought into relationship with the Federal Judicial system through the United States District Court for the Territory of Hawaii.

Appellant directs attention to the language used in the comparable section of the Foraker Act establishing a government for Puerto Rico which reads in part:

> "The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters or proceedings as between the courts

> of the United States and the courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico."
>
> (Act Apr. 2, 1900, 31 Stat. 84, c. 191, sec. 34; 48 U.S.C.A. 864.)

It is stated in reference to the above that had Congress intended the removal provision to apply in this Territory a similar concluding phrase such as "between the Courts of the Territory of Hawaii and said District Court" would have been employed in Section 86 (Op. Br. p. 22). The argument overlooks the fact that in the case of Puerto Rico the appellate relationship between its Supreme Court and the Federal system was not made to correspond to the procedure prescribed for that relationship between the state supreme courts and the Federal system (Section 35 of the Foraker Act, supra,) so that, unlike with Hawaii, only one Federal court was involved which naturally permitted the designation of the particular court affected.

The real significance of the Foraker Act to the issue of construction raised on this appeal lies in the fact that the language—"the laws of the United States relating to . . . removal of causes" appearing in our act (which was enacted but a few days after the Foraker Act) can hardly mean anything different from the identical language of the Puerto Rican Act, in respect to which the Appellant practically admits, as he must, that the provision on removals pertains not to appeals but to lateral transfers of causes from the Puerto Rico trial courts to its Federal District Court (Op. Br. pp. 22-23, and see *Peo. of Porto Rico v. Fortuna Estates,* C.C.A. 1, 279 F. 500, cert. denied 259 U.S. 587, 66 L. Ed. 1077).

(5)

THE CONSTRUCTION OF 28 U.S.C.A. SECTION 76 IS NOT INVOLVED ON THIS APPEAL.

28 U.S.C.A. Section 76 (Section 33 Judicial Code) reads in part:

> "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, . . . for or on account of any act done under color of his office or in the performance of his duties as such officer, . . . the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court . . . upon the petition of such defendant . . ."

We do not dispute Appellant's contention that the word "state" in the above statute does not include a Territory and we accept the conclusion reached in 13 Opinions of the Attorney General 584 cited in the opening brief (p. 14) for the proposition that the statute does not apply to a territory. But that holding proves nothing on this appeal except to show the reason and necessity for the inclusion of the conformity provision in Section 86 of the Hawaiian Organic Act in order to make removals to the Federal Court possible in this Territory.

Stress is placed in the opening brief on an argument revolving around the proposition that it would be inadvisable to have the provisions of 28 U.S.C.A. 76 operative in the Territory of Hawaii (Op. Br. pp. 12-17). The argument is directed against the wisdom of legislation which of course is purely a matter for the determination of Congress (*Southern Steamship Co. v. National L. Rel. Bd.*, — U.S. —, 62 S. Ct. 886, 86 L. Ed. 815 at 822). In the forepart of this brief it has been shown that the

amended petition for removal to the District Court set forth that at the time of the killing referred to in the Territorial indictment the defendant was acting as a customs officer which is one of the Federal officers covered by the statute (*Ex Parte Dickson,* 14 F. (2d) 609 at 613). The petition contained sufficient averments relative to the defendant's acting under color and authority of office to bring the cause within the privilege and protection of the statute. So that the only question here involved is whether or not 28 U.S.C.A. Section 76 was made applicable by Section 86 of the Hawaiian Organic Act, and it is entirely aside from any point as well as incorrect for Appellant to urge that 28 U.S.C.A. 76 is a criminal statute and should be strictly construed (Op. Br. pp. 24-25). It appears from the above quoted portion of the statute that it applies to civil suits as well as to criminal prosecutions against Federal officers and that it is remedial in character. Where open, the statute should therefore be given a liberal construction (*Colorado v. Symes,* 286 U.S. 510, 76 L. Ed. 1253 at 1257-8).

Likewise, Appellant's reliance upon the reasoning of the opinion of the United States Attorney General above referred to seems entirely misplaced. The type of judicial system existing in the Territory of Montana is shown by the opinion to have been so dissimilar to that created for Hawaii that what the Attorney General said incidentally in reaching his holding has no bearing herein unless it be to emphasize the point that Congress intended to depart from the usual Territorial standard in establishing the two system judiciary for Hawaii.

Tenn. v. Davis, 100 U.S. 257, 25 L. Ed. 648, is also referred to by Appellant for the historical function and

purpose of 28 U.S.C.A. Section 76 (Op. Br. pp. 12-13). But nothing stated in that opinion relative to the desirability of providing a speedy remedy for the extrication of a Federal officer who has become entangled with state law and local agencies could not apply equally to a Territory of Hawaii's caliber. (See *Peo. v. Fortuna Estates,* 10 Porto Rico Fed. 130 at 134, affirmed *Peo. v. Fortuna Estates, supra,* and *Maryland v. Soper,* 270 U.S. 9, 70 L. Ed. 449 at 457). The discussion could be extended. However, in the final analysis, the feature under discussion is purely one of legislative policy, and if Congress has seen fit to provide for the removal of causes from the insular courts of Puerto Rico to the Federal District Court for that United States possession (ante, p. 21) certainly the same policy would justify a similar regulation for the Territory of Hawaii.

Appellant endeavors to make a distinction in the application of the removal provision of Section 86 of the Organic Act between causes over which the Federal District Court might have assumed jurisdiction if the suit had been brought in it in the first instance and those causes, such as are covered in 28 U.S.C.A. 76, where the Federal court could have no original jurisdiction (Op. Br. pp. 10, 13-14). The argument is not developed but the intimation is that removals may be permissible in the former case but not in the latter. The answer to the proposition appears very definitely from the inclusive language of the statute, which we repeat:

> "The laws of the United States relating to . . . removal of causes . . . shall govern . . ."

No exceptions are set forth and none should be held as intended.

"To be governed by the law is to be governed not only by a part, but by the whole law relating to the subject."

Fisher v. Brower, 159 Ind. 139, 64 N. E. 614 at 618.

POINT 2.

THE PROVISIONS OF SECTION 86 OF THE ORGANIC ACT RELATING TO THE REMOVAL OF CAUSES HAVE NOT BEEN REPEALED.

For more convenient reference the portion of Paragraph (d) of Section 86 of the Hawaiian Organic Act now constituting 48 U.S.C.A. 645 is set forth hereunder:

> "Writs of error and appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as writs of error and appeals are allowed from district courts to circuit courts of appeal as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

Although Section 86 of the Organic Act has been subject to numerous amendments the above portion now reads as it was originally enacted with the exception that the designation "district courts" in the sixth line has been substituted for "circuit courts" to provide an adjustment necessitated by the abolition of the latter courts.

It is Appellant's contention that the second sentence of the above statute, being what we have denominated the conformity clause, has been impliedly repealed and completely eradicated by subsequent legislation. The Act of

March 3, 1911, Chap. 231, 36 Stat. at L. 1087, is mentioned but the provisions of 28 U.S.C.A. 225 are particularly credited with having accomplished that result (Op. Br. pp. 18-20).

Appellee's reply is that although the provisions of the conformity clause relating to appeals have been modified by such subsequent enactments, the remaining portion thereof has not been affected and still remains in force.

Section 86 of the Organic Act was first amended by the Act of March 3, 1905, Chapter 1465, 33 Stat. at L. 1035, which added a proviso extending the right of appeal from the Territorial Supreme Court to the United States Supreme Court to also include cases where the amount involved exceeded five thousand dollars.

By the Act of March 3, 1909, Chapter 269, 35 Stat. at L. 838, Section 86 of the Organic Act was further amended by changing its form to four paragraphs instead of one and by increasing the number of judges of the United States District Court to two. The provisions relating to the procedure of the District Court, being what is now the first sentence of 48 U.S.C.A. 645, were also amended by the addition of a regulation allowing appeals and writs of error to the Supreme Court from the District Court in those cases where appeals and writs of error were allowed from district and circuit courts to the Supreme Court of the United States.

The next amendment was by the Act of March 3, 1911, Chapter 231, 36 Stat. at L. 1087, entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary." The substance of Section 246 of the Code is set forth at page 18 of the opening brief. That section codified, but in no other way modified the existing law

regulating appeals from the Territorial Supreme Court, and whether it be considered as having superseded or as merely continuing the provisions of Section 86 of the Organic Act relating to such appeals, nothing in Section 246 or in any of the other sections of the Code affected the removal provisions of Section 86. Such is further made certain by Section 297 of the Code which repealed a number of specified laws and continued:

> "Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed."

The Act of January 28, 1915, Chapter 22, 38 Stat. at L. 803, amended Section 246 of the Judicial Code by including the Supreme Court of Puerto Rico within its provisions and by providing two additional methods for reviewing the decisions of the Supreme Courts of Hawaii and Puerto Rico, namely, by certiorari from the United States Supreme Court and by writ of error or appeal to the Circuit Courts of Appeals where the amount involved exceeded the value of five thousand dollars. It modified Section 86 of the Organic Act in so far as appeals from the Territorial Supreme Court were concerned but had no effect on removals.

Section 313 of the Act of July 9, 1921, Chapter 42, 42 Stat. at L. 108, again amended Section 86 of the Organic Act. Section 86 was rewritten in full but the provisions of the first two sentences of paragraph (d), with which we are directly concerned, were written just as they appeared after the amendment by the Act of March 3, 1909, Chapter 269, 35 Stat. at L. 838 (ante, p. 26). The

Act of 1921 therefore conflicted with Section 246 of the Judicial Code in so far as appeals from the Supreme Court of the Territory of Hawaii were concerned, but there is no necessity of attempting to reconcile that conflict since it did not pertain at all to the removal provision. It can safely be said that whatever may have been the status of appeals from the Territorial Supreme Court at this stage, the law on removal of causes remained as originally enacted.

Nor did the next amendment of Section 86 by the Act of February 12, 1925, Chapter 220, 43 Stat. at L. 890, alter the situation. That amendment affected only paragraph (a) of Section 86 (48 U.S.C.A. Section 641) which covers such matters as the number and salaries of the judges of the District Court, its sessions and the like.

The foregoing review is rather protracted but it serves the purpose of showing that prior to February 13, 1925, no legislation had been adopted which by any stretch could be held to have superseded or repealed, either directly or impliedly, the removal provisions of the conformity clause of Section 86 of the Organic Act. It clears the way for an unobstructed view of Appellant's proposal that the provisions of 48 U.S.C.A. 645 (Paragraph d, Section 86, Organic Act) have been completely wiped out by 28 U.S.C.A. 225 (Op. Br. pp. 19-20).

28 U.S.C.A. 225 is Section 128 of the Judicial Code of 1911 (36 Stat. at L. 1087) as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. at L. 936. Prior to the amendment Section 128 dealt only with appeals to the circuit courts of appeal from the district courts, including the United States District Court for the Territory of

Hawaii. The Act of 1925 amended the section to read in pertinent part as follows:

> "Sec. 128 (a) The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions. . . .
>
> Second. In the United States district courts for Hawaii and for Porto Rico in all cases. . . .
>
> Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings . . ."

The provisions of the Fourth subdivision are clearly incompatible with the second sentence of Paragraph (d) of Section 86 of the Organic Act (48 U.S.C.A. 645) since the former vests appellate jurisdiction over the Supreme Court of the Territory in this Court to the complete exclusion of the direct appeals to the United States Supreme Court allowed as in the case of a state supreme court by Paragraph (d) of Section 86 of the Organic Act. In view of this conflict there is no doubt that the right of appeal from the Supreme Court of the Territory of Hawaii to the United States Supreme Court no longer exists. But Appellant's quick conclusion that, "That being so, there is nothing left of the second sentence of 48 U.S.C.A. Section 645" (Op. Br. p. 19) is a non sequitur of high rank.

As we have seen, the second sentence of 48 U.S.C.A. 645 deals not only with appellate jurisdiction over the Territorial Supreme Court but also with removals and "other matters and proceedings" between the Territorial trial courts and the Federal district court. The conflict

pointed out by Appellant affects only the appellate provisions of the statute and consequently the scope of the repeal does not extend beyond those provisions.

That repeals by implication are not favored is a basic rule (*U.S. v. Jackson,* 302 U.S. 628, 82 L. Ed. 488 at 491; *Posadas v. National City Bank,* 296 U.S. 497, 80 L. Ed. 351 at 355; *U.S. v. Noce,* 268 U.S. 613, 69 L. Ed. 1116 at 1119). The rule's equally familiar variant, particularly applicable here, is to the effect that an act which is inconsistent with but which does not cover the entire subject matter of a prior statute will not effect a repeal of the provisions of such prior statute beyond the extent of the inconsistency.

> "When there are two Acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy . . ."
>
> *Chicago M. & St. P. R. Co., v. U.S.,* 127 U.S. 406, 32 L. Ed. 180 at 182.

> "It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute."
>
> *Frost v. Wenie,* 157 U.S. 46, 39 L. Ed. 614 at 619.

See also:

Crawford Statutory Construction, Sec. 326, pp. 674-675

59 C.J. 923, Sec. 523.

The Act of February 13, 1925 was confined to amendments of sections of the Judicial Code regulating the appellate jurisdiction of the Circuit Courts of Appeal and the United States Supreme Court. Non-appellate matters, such as removals, were entirely foreign to the act. It follows then from an application of the above principles that the effect of the Act of 1925 on Section 86 of the Organic Act was to repeal only the provisions relating to appeals from the District Court and from the Supreme Court of the Territory. Not only is such limitation of the repeal apparent from a consideration of the extent of the repugnancy of the terms of the two acts but it has also been expressly so limited.

Section 13 of the Act of February 13, 1925 provides:

> "That the following statutes and parts of statutes be, and they are, repealed:",

then enumerates certain acts and parts of acts, including Section 246 of the Judicial Code which we have noted was in conflict with Section 86 of the Organic Act, and also:

> "So much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii."

The foregoing provision limits the repeal to the elimination of appeals to the United States Supreme Court from the Hawaiian Supreme Court and from the Federal District Court for the Territory of Hawaii. It defines the extent to which the Act of February 13, 1925 interferes with Section 86 of the Organic Act and excludes any implication of a more extended repeal (*Great Northern Ry. Co. v. U.S.,* C.C.A. 8, 155 F. 945 at 953, affirmed 208

U.S. 452, 52 L. Ed. 567). It affords double assurance that the Appellant's contention that the removal provisions of Section 86 of the Organic Act have been eradicated is erroneous.

CONCLUSION

It is respectfully submitted that the United States District Court for the Territory of Hawaii had the authority to and did properly acquire and retain jurisdiction of the Territorial indictment returned against the Appellant and that therefore the judgment appealed from should be affirmed.

Dated at Honolulu, T.H., this 18th day of July, 1942.

Respectfully submitted,

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